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No. 83-945

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1983

UNION OIL COMPANY OF CALIFORNIA,
*Petitioner,*

vs.

DILLINGHAM TUG & BARGE CORPORATION,
NICKUM & SPAULDING ASSOCIATES, INC.,
and
THE SALVAGE ASSOCIATION,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Was the Ninth Circuit correct in its two unanimous decisions holding enforceable the contract between Dillingham and Union and denying Union's request to void the contract on public policy grounds?

## THE PARTIES

The parties to this action are Dillingham Tug & Barge Corporation ("Dillingham"), Union Oil Company of California ("Union"), Petitioner herein, Nickum & Spaulding Associates, Inc. ("Nickum & Spaulding"), and The Salvage Association.

Collier Carbon & Chemical Corporation, originally the defendant and later an appellee herein, was apparently merged into Petitioner Union during the course of this litigation. Third-Party Defendant Todd Shipyards Corporation ("Todd") settled with Petitioner Union prior to trial.

## LISTING OF PARENT, SUBSIDIARY AND AFFILIATED COMPANIES

Dillingham Corporation, the parent company of Dillingham Tug & Barge Corporation, is a privately held company. In addition to wholly-owned subsidiaries, Dillingham Corporation owns an interest in the following companies:

Conoco-Dillingham Oil Company
Dillingham Corporation of Micronesia
Dillingham Industries Limited
Electrix Limited

No such interest is held by Dillingham Tug & Barge Corporation, however.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I

### OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Honorable Daniel Holcombe Thomas, Senior District Judge of the United States District Court for the Southern District of Alabama, sitting by designation in the United States District Court for the Northern District of California, is reported at 548 F.Supp. 691 (N.D. Cal. 1981).[1] The decision of the Court of Appeals is reported at 707 F.2d 1086 (9th Cir. 1983).

[1]Union is apparently unaware of the report of the District Court's decision. Union's Petition for Certiorari, p. 1, neglects to cite it.

## II

## BASIS FOR SUPREME COURT JURISDICTION

Petitioner Union is seeking review of a decision of the United States Court of Appeals for the Ninth Circuit. That decision, with the addition of certain typographical errors, is set forth as Exhibit 1 in the Appendix to Union's Petition for Certiorari, and is reported as noted *supra* p. 1. The official decision is incorporated herein by reference.

This unanimous decision of the U.S. Court of Appeals for the Ninth Circuit was handed down June 10, 1983. Union filed a Petition for Rehearing in the Court of Appeals, which was summarily denied by a unanimous panel without opinion on September 6, 1983. Union filed its Petition for Certiorari in this Court on December 5, 1983. Counsel for Dillingham received copies of Union's Petition by United States mail on December 8, 1983.

Should it accept this case for review, this Court would have jurisdiction pursuant to 28 U.S.C. § 2101(c), as reflected in Rules 20.2 and 20.4 of this Court. The District Court had jurisdiction of this case in admiralty pursuant to 28 U.S.C. § 1333(1).

## III

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Union's Petition for Certiorari does not involve any federal questions, Constitutional provisions or treaties. Should this case be accepted for review, this Court's decision will require interpretation of the International Voyage Loan Line Act of 1973, in particular 46 U.S.C. § 86b, and of 46 U.S.C. § 395, which requires inspection by the United States Coast Guard of barges which make ocean voyages. Interpretation of the relevant regulations issued pursuant to those statutes will also be required.

## IV
## STATEMENT OF THE CASE

### A. Statement of Facts

The facts upon which this action is based are agreed to in large part by the parties. Union signed a contract[2] with Dillingham on January 17, 1977, after extensive negotiation between representatives of the two companies.[3] The contract provided that Dillingham would tow Union's inland river barge in the open ocean from Galveston, Texas to Portland, Oregon, by way of Panama. Because of the nature of this tow, the manuscript agreement was specially prepared to apply to this transaction,[4] but was based upon a previous contract between the same two parties. Union had investigated various other manners of transporting the barge, but chose an in-the-water tow without building a cover over the barge's open hopper because this was the cheapest of various alternatives.[5] Union negotiated with several towboat companies, and selected Dillingham because it submitted the lowest bid. The contract provided, *inter alia*, that Union would procure hull and machinery insurance on the barge to its full value, in form and amount

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[2]The Towage Agreement between Union and Dillingham (Dillingham's subsidiary involved herein was formerly known as Hawaii Tug & Barge Co., Ltd.) (hereinafter the "contract") is set forth, with certain typographical errors, as Exhibit 6 in the Appendix to Union's Petition for Certiorari. The contract is incorporated herein by reference.

[3]*See* Exhibits 1 through 9, which are telexes constituting negotiation and finalization of various terms of the contract. These telexes span the period from December 17, 1976 through January 28, 1977. *See also* Exhibit 10, a letter from Union to Dillingham enclosing the first draft of the contract, prepared by Union.

[4]*See* Exhibit 10, the letter which transmitted the first draft of the contract from Union to Dillingham.

[5]548 F.Supp. at 693-4.

satisfactory to Dillingham, and Union would look only to this insurance in the event of loss of or damage to the tow.[6]

The Salvage Association approved the barge for tow, on behalf of Union's underwriters. The barge was prepared for tow by Todd, pursuant to specifications prepared by Nickum & Spaulding.[7] These included the addition of thin sheetmetal straps over the cargo tanks, which it was hoped would hold the tanks in the open hopper of the barge when water accumulated therein; water in the hopper would tend to sink the barge and cause the empty tanks to float out.[8]

The barge was safely towed by Dillingham for four weeks, through the Gulf of Mexico and the Panama Canal. However, off Baja California, the tow encountered its first rough weather. The barge broke up on February 25th, 1977, while the tug was attempting to tow it to shore.[9]

Following the loss of the Barge *Columbia*, Union purchased a replacement barge of exactly the same type and design as the *Columbia*. Realizing that an in-the-water ocean tow of an inland river barge presented an unreasonable risk of loss, Union this time contracted with and paid Dillingham to load the replacement barge on the deck of a larger, oceangoing barge, which transported the replacement barge to Portland without incident.[10]

**B. Proceedings in the Courts Below**

Since its inception, this case has involved primarily the enforceability of the provisions of the contract between Union and Dillingham. This is the principal issue upon

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[6]Contract, *supra* note 2, Paragraph 7.

[7]548 F.Supp. at 693-4.

[8]548 F.Supp. at 694.

[9]707 F.2d at 1089.

[10]548 F.Supp. at 697.

which Union now bases its Petition for Certiorari. Union asserts that the agreement the parties made that Union would insure its barge for the benefit of both Union and Dillingham, is an exculpatory provision which is void on grounds of public policy. This issue has been fully, if not exhaustively briefed throughout this litigation, and has been directly ruled on twice by the District Court and twice by the Court of Appeals.

On September 1, 1977, Dillingham filed in the District Court a Motion to Dismiss [Union's] Counterclaims. In its response, Union argued that the insurance requirement provisions of the contract are exculpatory clauses, prohibited on public policy grounds by *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) [hereinafter cited as *Bisso.*].

In ruling on Dillingham's motion, United States Magistrate Thomas H. Rothwell held that "The validity of the provision in the parties' contract requiring the purchase of insurance is not really before the Court on plaintiff's motion to dismiss."[11] The Court therefore made no ruling on the insurance requirement issue, having assumed the motion was based on other provisions of the towage agreement, and the motion was denied on other grounds.

The insurance requirement issue was thoroughly briefed by the parties in advance of trial. Union and Dillingham each filed a trial brief of approximately 30 pages. In addition, the issue was fully set forth in the Joint Pretrial Statement, which was filed with the Court on March 18, 1980.

This case was tried in September and October of 1980 in the United States District Court for the Northern District of California before Senior District Judge the Honor-

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[11]Memorandum Report and Order, set forth as Exhibit 7 in the Appendix to Union's Petition for Certiorari.

able Daniel Holcombe Thomas of the United States District Court for the Southern District of Alabama, sitting by designation. At the close of trial, both Dillingham and Union submitted Proposed Findings of Fact and Conclusions of Law. These pleadings restated the parties' positions on the insurance requirement issue. Three weeks later, Union filed an unsolicited second set of Proposed Findings of Fact and Conclusions of Law which was 89 pages in length, plus a Supplemental Trial Brief, both of which further discussed the insurance requirement issue. Dillingham also filed a Post-Trial Brief, which did not directly address the insurance requirement issue.

On March 2, 1981, judgment was entered in favor of Union. The District Court held that Union breached its contract with Dillingham by self-insuring the barge for the first $1,000,000 of its value, instead of fully insuring it as the contract required. Therefore it held Union could recover none of the first $1 million of the barge's value. The court then found that Union had received $1,000,000 from its insurance underwriters, who had waived subrogation against the tower and therefore could not recover from Dillingham. Nonetheless, the Court allowed Union to recover from Dillingham, the Salvage Association and Nickum & Spaulding for that portion of the barge's value for which Union had been paid by its underwriters.[12] However, Dillingham prevailed on the issue of and the Court upheld the validity of the insurance requirement provisions, and refused Union's request to strike them down as contrary to the *Bisso* doctrine.[13]

On March 12, 1981, Dillingham filed a Motion to Alter or Amend Judgment, requesting that the court reconcile

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[12]548 F.Supp. at 698, 700.

[13]548 F. Supp. at 698.

various inconsistencies in its original decision. Dillingham again briefed a portion of the insurance requirement issue, and Union presented in its opposition the same arguments contained in its Petition for Certiorari herein, that the contract is unenforceable on public policy grounds. On September 17, 1981, the Court filed its Supplemental Findings of Fact and Conclusions of Law, which are reported at 548 F.Supp. 700-703. This supplemental decision did not change the outcome of the case, and the Court reiterated its belief that Union could recover for the portion of the value of the barge for which its underwriters had reimbursed it. Dillingham filed the first Notice of Appeal in this matter on September 21, 1981. The remaining parties later filed notices of appeal also.

In the United States Court of Appeals for the Ninth Circuit, Dillingham filed its Brief of Appellants, Answering Brief of Appellants and Reply Brief of Appellants, pursuant to the Court's briefing schedule. On April 19, 1982, Union filed its Appellant's Opening Brief against The Salvage Association and Nickum & Spaulding. On August 2, 1982, Union filed its Appellant's Opening Brief Against Dillingham Tug & Barge Corporation. Because this brief was 47 pages in length, the United States Court of Appeals for the Ninth Circuit ordered it stricken and ordered Union to file a brief not to exceed 35 pages. On August 26, 1982, Union filed its Appellant's Opening Brief Against Dillingham Tug & Barge Corporation, which was 34 pages in length. Union later filed Appellants' Consolidated Answering Brief Against The Salvage Association and Nickum & Spaulding Associates, Inc., and Appellants' Consolidated Answering Brief Against Dillingham Tug & Barge Corporation. The insurance requirement issue was fully briefed by both Union and Dillingham *passim*.

The decision of the United States Court of Appeals for the Ninth Circuit of June 10, 1983, reversed the judgment

against Dillingham in its entirety. Union was prohibited from recovering a second time for that portion of the value of the barge for which it already had been paid by its underwriters. The Court then affirmed that the contract provisions requiring Union to insure the barge to its full value and to look only to said insurance in the event of loss were fully enforceable, were not forced on Union as a result of overreaching, and were not waived by Dillingham. The Court went on to hold specifically that, as Dillingham had argued, the contract provisions were not exculpatory clauses void on grounds of public policy, as Union urges herein. The Court based its decision on a long line of cases decided by the Court of Appeals for the Fifth Circuit, which will be discussed *infra* p. 13. Finally, the collateral source rule was held not to apply because the insurance proceeds received were not from a source independent of Dillingham, since the contract with Dillingham required Union to procure said insurance. The Court affirmed that Union had self-insured for the amount of the $1,000,000 deductible applicable to its policy, and therefore Union could not collect that amount from Dillingham either.

Union filed its Petition for Rehearing in the Court of Appeals on June 27, 1983. It was summarily denied without opinion by a unanimous panel on September 6, 1983.

## V

## ARGUMENT

### A. Aside From Certain Factual Contentions by Union, the Sole Question Before This Court Is the Enforceability of the Towage Contract

#### 1. Union Nowhere Asserts that Its Request for Review Concerns Anyone Other Than the Named Parties

Notably absent from Union's Petition for Certiorari is any assertion that the instant case, should this Court accept

it for review, or any of the issues presented therein, are of the slightest concern to any person or entity other than the four parties whose names appear in the caption of the case. Union makes no claim that any of the issues addressed herein rise to a level deserving of this Court's attention. The one legal issue, the enforceability of a contractual requirement to procure insurance, is of relatively narrow import and is unlikely to affect many parties or transactions, and Union's request that this Court overturn certain factual findings of the trial court which were affirmed by the Court of Appeals, is trivial at best. Therefore on its face, Union's Petition for Certiorari should be denied.

### 2. The Court of Appeals Properly Enforced the Provisions of the Contract, and There Is No Reason for Review in This Court

The contract of towage between Dillingham and Union is reprinted as Exhibit 6 in the Appendix of Union's Petition for Certiorari. For the sake of brevity, Dillingham will not cause the contract to be reprinted here, but will incorporate it by reference. As noted *supra* note 4, Union initially proposed, drafted and sent to Dillingham the form of the contract which, with modifications, ultimately was signed by the parties.[14] The parties thereafter exchanged eight (8) telexes[15] and made numerous telephone calls during which modifications to the draft agreement were discussed, and when the contract was agreeable to both parties, it was executed on January 17, 1977.[16] It is worthy of note that, prior to execution of the contract, the draft agreement was carefully reviewed by Union's legal depart-

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[14]*See* Exhibit 10, the letter which transmitted the draft agreement from Union's Project Manager to Dillingham's Marketing Manager.

[15]*See* Exhibits 2 through 9, inclusive.

[16]Contract, *supra* note 2.

ment, which expressed no reservations whatever concerning the terms contained therein.[17]

At the outset, Union's Petition for Certiorari attempts to mislead this Court by restating the extraneous argument that the entire towage contract should be voided because Paragraph 4 thereof may be unenforceable as contrary to public policy.[18] Union asserts that: "Clause Four of the

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[17]Charles A. Dow, Union's Manager of Project Engineering, testified at trial that he read the draft contract before it was signed, and that he was fully aware of the provision therein that Dillingham was to be named an additional assured with waiver of subrogation under Union's hull and machinery policy.

"Mr. Booth:

Q. . . . what did you do with a copy of those provisions? Did you refer them to anyone for review?

A. Yes.

Q. Who did you send it to?

A. First reviewed it with my boss, Overshaw, and then in turn sent it to our insurance or Mr. McCullough [Union's Manager of Insurance].

Q. You also sent a copy of it for review to your legal department, didn't you?

A. Yes.

Q. Now . . . you sent a reply back to Mr. Jonsson [Dillingham's Marketing Manager] saying that Collier [Union] accepted all those modifications to the contract?

A. If you have a letter saying so, yes.

Q. Well, let me show you [Exhibit 3 hereto], a telex of the 6th of January, from yourself to Mr. Jonsson. I will ask you if that's the import of that telex.

A. Yes."

Testimony of Dow, Record at 1502-1503.

[18]Dillingham submits that Paragraph 4 of the contract is not void as contrary to public policy pursuant to *Bisso, supra,* because Paragraph 4 provides that Dillingham shall not be liable for loss of or damage to the barge ". . . unless caused by the actual fault and privity of [Dillingham] . . ." In other words, the parties contractually agreed that Dillingham would not be responsible for loss of or damage to the barge caused by the acts or omissions of Union or of third parties. In any case, Paragraph 4 has never been an issue in this litigation.

towage agreement purported to exculpate Dillingham for any loss or damage to the [sic] resulting from the acts or negligence of Dillingham."[19] (footnote omitted). Dillingham has stated from the beginning that it places no reliance in this litigation on Paragraph 4 of the towage agreement. While this repetition should not be necessary, Dillingham restates now for the third time that it places no reliance herein on the provisions of Paragraph 4, since Union apparently refuses to accept Dillingham's waiver of this argument.[20]

This litigation actually concerns the provisions of Paragraph 7 of the contract, Union's knowing and willful breach of Paragraph 7's provisions, and their enforceability following arms'-length bargaining between sophisticated corporations seeking to allocate the cost of insurance as one element of an agreement reached between them. Union has been attempting unsuccessfully for seven years to have the insurance requirement provisions of the towage contract struck down by a court of law as exculpatory clauses contrary to public policy. So far, Union has not succeeded once.

In Paragraph 7 of the contract, Union and its underwriters agreed to six provisions. As required, Union and its underwriters procured minimal, although not satisfac-

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[19]Petition for Certiorari, p. 7.

[20]In its Answering Brief of Appellants, filed in the Court of Appeals on October 12, 1982, Dillingham stated:

> "At three places in its opening brief, Union has referred to and cited portions of Paragraph 4 of the towage agreement between Union and Dillingham. Union asserts that this paragraph and its provisions are void as against public policy pursuant to *Bisso v. Inland Waterways Corp.* Dillingham has placed no reliance on this provision of the towage agreement throughout the course of this litigation, but for the sake of clarity, Dillingham re-states that it does not rely thereon in this appeal." (footnotes omitted).

tory, hull and machinery insurance on the barge; Union's underwriters waived subrogation against Dillingham; and Dillingham was named an additional assured[21] under the hull policy, but with loss payable to Union.[22] Union breached Paragraph 7 of the contract,[23] in that it did not procure *full value* hull insurance, but only insured half of the barge's value,[24] and the hull insurance was not satisfactory in form and amount to Dillingham; in fact, its terms were never presented to Dillingham for review. Finally, Union obviously has refused to look only to its hull and machinery insurance for recovery of the subject loss.

The Ninth Circuit held, and Dillingham believes, that it is obvious that insurance is a fact of life in modern business, and insurance arrangements such as the one at issue herein are common in many types of commercial agreements.[25] Both parties to the contract knew it would be procured, and it was only a question of who would pay

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[21]"Assured" is an insurance industry variation of the word "insured".

[22]*See* Exhibit 9, wherein Union confirmed that its underwriters had waived subrogation against Dillingham, and had named Dillingham an additional insured under the hull and machinery policy.

[23]The District Court so held at 548 F.Supp. 703. The Court of Appeals affirmed this finding at 707 F.2d 1091.

[24]707 F.2d at 1091.

[25]*See Ogea v. Loffland Bros. Co.*, 622 F.2d 186 (5th Cir. 1980) (contract between drilling platform owner and operator which required the operator to procure insurance naming the owner as a co-insured with waiver of subrogation); *Aetna Casualty and Surety Co. v. L.K. Comstock & Co.*, 488 F.Supp. 732 (D.Nev. 1980) (agreement between owner and prime contractor for construction of oil storage tank, wherein contractor was obligated to procure insurance with owner as named insured); *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980) (contract between stevedoring contractor and steamship company providing that steamship company would be named a co-insured under stevedore's liability insurance policies).

for it. This case falls squarely under the Fifth Circuit line of decisions which begins with *Fluor Western, Inc. v. G&H Offshore Towing Co., Inc.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1971) [hereinafter cited as *Fluor Western*] and *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974) [hereinafter cited as *Twenty Grand Offshore*].

In *Fluor Western*, the Court held that ". . . contracting parties should be free to distribute liabilities and costs as they wish."[26] The Court in that case noted that a provision almost identical to the one at issue between Dillingham and Union actually waived no rights in and of itself. There the cargo insurance underwriters waived their rights to subrogation only by a later and independent agreement.[27] This likewise occurred in the present case when Union's underwriters, at the request of Union and pursuant to Union's obligations under the contract, waived their rights of subrogation against Dillingham.[28] The Court in *Fluor Western* further held that:

> ". . . public policy . . . [does not require] that any particular party should necessarily bear the cost of such insurance, particularly when the party that does bear the cost [Union] had an insurable interest . . . and is to be the named insured, as is the case with the plaintiff in this suit."[29]

Dillingham submits that *Twenty Grand Offshore, supra,* is even more closely on point, since it involved the loss of a barge and suit by the barge owner against a tug. As in the instant case, the barge owner breached the contract and failed to make the agreed insurance arrangements.

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[26] 447 F.2d at 38.

[27] 447 F.2d at 39-40.

[28] *See* Exhibit 9.

[29] 447 F.2d at 40.

The Court found the reasoning in *Fluor Western* compelling, particularly because:

> ". . . [I]f the barge *complies* with its contractual obligation to effect a waiver of subrogation it may not sue the tower, but if the barge *breaches* its contractual obligation to effect a waiver of subrogation it is free to pursue the tower."[30]

The insurance provisions at issue are neither onerous nor unusual, as *Fluor Western* and *Twenty Grand Offshore* indicate. The barge was to be insured to its full value and Dillingham was to be named an additional insured, but with loss payable to Union. Having received a lower price for the towage services rendered by Dillingham, and various other considerations which will be discussed *infra*, Union in exchange contracted to look solely to the joint policy of hull and machinery insurance if the barge were damaged or lost. As the Ninth Circuit noted, the parties were effectively insuring themselves under one insurance policy instead of two. Obvious cost savings resulted.[31]

Union would have this Court believe that Union's agreement to an allegedly one-sided series of requirements was coerced by Dillingham, and then said provisions were unilaterally enforced by the Ninth Circuit's decision. This is untrue. Indeed, the towage contract provided far more duties and obligations to Dillingham than to Union. The contract provided in Paragraph 9 that Dillingham:

> ". . . will indemnify, defend and hold [Union] harmless from any and all claims, liabilities, loss or expense, including costs and attorney's fees, arising out of or connected with injury to or death of the officers and crew of the tug, and/or loss of or damage to the tug . . ."[32]

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[30] 492 F.2d at 685.

[31] 707 F.2d at 1090.

[32] *See* Exhibit 6 to the Appendix to Union's Petition for Certiorari.

In addition, as an addendum to the agreement, Union telexed that ". . . [Dillingham] must obtain its own towers [sic] liability [insurance]."[33] Dillingham confirmed by return telex that it carried such tower's liability coverage.[34] Finally, Paragraph 1 of the contract provided that Dillingham would use due diligence to provide a seaworthy tug, to properly outfit and man it, and to take all steps necessary at the commencement of the tow to satisfy surveyors appointed by Union.[35] Union's Petition for Certiorari neglects to inform this Court that the towage contract represented the results of give and take on both sides, and was the product of arms'-length negotiation between Dillingham and Union which spanned a period of almost six weeks.[36]

The District Court held[37] that there was no overreaching of Union by Dillingham. The Ninth Circuit specifically affirmed this finding,[38] noting that ". . . Union failed to meet their burden of establishing the existence of overreaching."[39] Although in the contract involved in *Twenty Grand Offshore* there were mutual insurance requirements, the Ninth Circuit herein held that mutuality is not required for the enforcement of an insurance requirement provision.[40] (The Court of Appeals apparently disregarded

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[33]*See* Exhibit 7.

[34]*See* Exhibit 8.

[35]Contract, *supra* note 2.

[36]*See* Exhibits 1-9. Exhibit 1 is a telex dated December 17, 1976, and it outlines the general parameters of the agreement between Union and Dillingham. Exhibit 9, constituting confirmation that certain contract requirements had been satisfied, is a telex dated January 28, 1977.

[37]548 F.Supp. at 698.

[38]707 F.2d at 1090.

[39]*Id.*

[40]*Id.*, citing *BASF Wyandotte Corp. v. Tug LEANDER, JR.*, 590 F.2d 96 (5th Cir. 1979).

the fact that Dillingham was required herein by Union to procure insurance as well.)

Union's attempt to overturn the contract, predicated as it is upon a misinterpretation of what is required by public policy, simply defies logic. To assert that a tugboat company was guilty of overreaching Union, the 28th largest industrial corporation in the United States, with annual sales of $10.4 billion,[41] when the towage agreement was specifically approved without protest by both Union's insurance and legal departments[42] prior to its execution, is not credible.

### 3. Public Policy Considerations

Union asserts that the insurance provisions in the contract are unenforceable, based upon the public policy considerations enunciated by this Court in *Bisso, supra.*

> "Union submits that this insurance provision effectively precludes any liability of Dillingham for loss of the *Columbia* and is therefore just as void and enforceable [sic] as a direct attempt at exculpation."[43]

*Bisso* concerned a provision in a towing contract that the towage would be at the "sole risk" of the barge and that the master and crew of the tug would be deemed the servants of the barge.[44] Both provisions were designed to prevent the barge owner from making any recovery whatever in the event of loss. This Court held the tug company could not contract out of responsibility for its own negligence in this manner for two reasons: (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being

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[41]The 500 Largest U.S. Industrial Corporations, *Fortune,* May 2, 1983, at 228.

[42]Testimony of Dow, *supra* note 17.

[43]Petition for Certiorari, p. 8. Dillingham assumes Union meant to say "unenforceable".

[44]349 U.S. at 86.

overreached by those who have the power to drive a hard bargain.[45]

*Bisso* is not a popular decision, and it has been widely criticized. The strong dissent to the decision by Mr. Justice Frankfurter, in which he was joined by Justices Reed and Burton, points out the inherent weakness in the *Bisso* logic:

> The argument is made that permitting the parties to grant immunity to the tug will stimulate irresponsibility, or, at least, that it is necessary to force the tug to bear losses resulting from its negligence in order to provide an incentive to reasonable care. In the commercial setting of the towage industry this argument has little force, unless we are prepared also to forbid the tug to insure against such losses or liabilities. If not, then the question ultimately is whether public policy requires that the tug, rather than the tow, shall bear the cost of insurance. . . In the absence of anything in the record, or any facts of which this Court may take judicial notice, that the tug has exploited an unfair bargaining position, there is no reason why the parties should not be free to distribute this cost as they see fit.[46]

Moreover, Mr. Justice Harlan noted in a concurring opinion in 1963 to the decision in *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co.*, 372 U.S. 697 (1963), a case relied upon heavily by Union herein, that ". . . I would prefer to see *Bisso* reconsidered, believing, with deference, that it was wrongly decided. . ."[47] Dillingham submits that in 1984 these and other criticisms of the *Bisso* rationale[48] are more compelling than the majority decision in that case. There

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[45]349 U.S. at 91.

[46]349 U.S. at 118-119.

[47]372 U.S. at 698.

[48]Feingerts, B.L. and Stein, M.S., *Exculpatory Provisions in Towage Contracts*, 49 Tul.L.Rev. 392 (1975).

are strong public policy considerations in favor of such insurance requirement provisions, as the Ninth Circuit noted herein at 707 F.2d 1089, and the Court of Appeals' decision was correct in enforcing the terms of the towage contract to which Union freely agreed.

### 4. The Insurance Requirement Was Never Waived by Dillingham

Realizing that the public policy arguments it is making are unpersuasive and insufficient to overturn the contract, Union in its Petition for Certiorari also attacks the findings of fact of the District Court, which findings were affirmed by the Court of Appeals. Specifically, Union alleges in its "Statement of Facts" that "Dillingham was informed of [the $1,000,000] deductible prior to the departure of the tow from Galveston, Texas."[49] While this is Union's position, which it has argued at length, Union persuaded neither the District Court nor the Court of Appeals that the existence of a $1,000,000 policy deductible was ever conveyed to Dillingham. The trial court specifically refused to find that this information had been conveyed to Dillingham,[50] and the Ninth Circuit noted that the parties dispute whether Dillingham was ever so informed.[51] The Court of Appeals then affirmed the lower court's ruling that Dillingham in any case never waived its objection to the existence of this secret self-insurance arrangement.

Since Union argued that there was a waiver of a contract provision, it had the burden of pleading and proving facts establishing waiver.[52] Having failed to convince either court

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[49]Petition for Certiorari, p. 3.

[50]548 F.Supp. at 701.

[51]707 F.2d at 1089.

[52]Waiver is an affirmative defense, Fed.R.Civ.P. 8(c), and the burden of pleading and proving facts sufficient to establish waiver is on the party (Union) asserting the waiver occurred. *United States v. Poland*, 251 U.S. 221, 227-228 (1920).

below to make a finding in its favor, Union has failed to prove the existence of any waiver. Indeed, the Court of Appeals affirmed the trial court's ruling: " . . . Union breached its agreement to insure the barge for its full value by insuring it with a $1,000,000 deductible. . . Union therefore became a self insurer for this $1,000,000."[53] Dillingham asserts there is no basis whatever to disturb these findings and conclusions of the Court of Appeals.

### 5. There Is No Split Among the Circuits on the Insurance Provision Issue

In an attempt to persuade this Court to accept this matter for review, Union asserts that there is a split among the Courts of Appeals regarding the enforceability of insurance requirement provisions. Dillingham asserts that no such split exists. Rule 17.1(a) of this Court states that one of the special and important reasons which may persuade this Court to grant review on a writ of certiorari is a Court of Appeals decision in conflict with the decision of another Court of Appeals on the same point. It should be noted that the rule requires a *decision* by both Courts of Appeals. Mere *dictum* in a decision of one Court of Appeals which is in conflict with the decision of another Court of Appeals is an insufficient reason to grant a petition for certiorari. *See Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924), wherein the Court dismissed as improvidently granted a writ of certiorari which had previously been granted, based in part on *dictum* in the trial court's decision.

It is important that this Court:

> ". . . be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of parties, and in cases where there is a real

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[53] 707 F.2d at 1091.

> and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Indeed, a mere conflict between or among the circuits is not enough; the issue in conflict must be significant and worthy of this Court's attention. In *Freeman v. Flake*, 405 U.S. 1032 (1972) (Douglas, J., dissenting), this Court denied a petition for a writ of certiorari, despite the fact that four courts of appeals had decided the issue in question one way, and four had decided the exact opposite.

Union asserts that *PPG Industries v. Ashland Oil Co.*, 592 F.2d 138 (3d Cir. 1978), *cert. denied*, 444 U.S. 830 (1979) [hereinafter cited as *PPG Industries*] is a *decision* in conflict with *Twenty Grand Offshore* and *Fluor Western, supra*. In fact, *PPG Industries* has *dictum* which appears to conflict with those decisions; however, its decision is based upon different considerations entirely, as will be seen *infra*, and in that case there was a very different alignment of the parties than exists in the present case. Furthermore, the *PPG Industries* decision contains a strong dissent by Circuit Judge Rosenn, which states that the distinction made in *Fluor Western, Twenty Grand Offshore* and the other Fifth Circuit cases, between the requirement to procure insurance and exculpatory clauses, is valid and should be followed.[54] It is unclear what the Third Circuit would decide, if faced with the same facts and alignment of parties as existed in *Twenty Grand Offshore* or the instant case.

It should be noted that *PPG Industries* is a case to which the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315 applies. COGSA was incorporated by reference into the contract of affreightment at issue therein.

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[54] 592 F.2d at 153-154.

This in itself distinguishes *PPG Industries* from the instant case, in that the Court there was concerned with the duties of a common carrier and the statutory requirements and allocations of rights and duties between carriers and shippers that COGSA provides. The present case, on the other hand, involves a custom-tailored private towage agreement between sophisticated entities, not governed by any statute, and not involving common carriage.

The contract between PPG, the cargo owner, and Ashland, the tower, required the cargo owner to purchase insurance with waiver of subrogation in favor of the carrier. However, by the time PPG brought suit against Ashland, the statute of limitations under COGSA had run, and the District Court dismissed Ashland from the case. Thus the only party in a position analogous to that of Dillingham herein, and in a position to enforce the contractual requirement regarding the purchase of insurance, was not before the Court. Another tower, Canal Barge Company, with whom Ashland had contracted to perform most of Ashland's responsibilities to PPG, remained before the Court, and tried to avail itself of PPG's agreement with Ashland to procure insurance and waive subrogation. However, there was no privity of contract between PPG and Canal, and the contract between Ashland and Canal made no mention of cargo insurance. Thus the legal issue decided by the Court in *Fluor Western* and by the Ninth Circuit herein, was not before the Court and was not ruled on in *PPG Industries*. Canal never bargained with PPG about insurance, and could not show a reduction of its charges on that basis. Hence the insurance clause was held to apply to and benefit no one other than Ashland.[15] The Court's expression in *dictum* of its belief that the insurance requirement provision of the contract might be unenforceable, a point the Court was not called upon to decide, lacks persuasiveness

[15] 592 F.2d at 145.

in the instant case, given the alignment of the parties in *PPG Industries* and the absence of the party which bargained for the insurance provision in the first place. The decision in *PPG Industries* is not a decision in conflict with the decision of another Court of Appeals on the same point, as contemplated by Rule 17.1(a).

While Union has placed great reliance upon the *dictum* in this lone Third Circuit decision, it has failed to advise this Court of the dozens of decisions in several circuits which follow the reasoning of *Fluor Western* and *Twenty Grand Offshore*.[56] Not only is the clear weight of authority in support of affirming the enforceability of such insurance requirements, as the Ninth Circuit did herein; no decision holds to the contrary.

It also should be remembered that a Petition for Certiorari was denied by this Court in the *PPG Industries*

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[56]*E.g., Alamo Chemical Transportation Co. v. M/V OVERSEAS VALDES*, 469 F.Supp. 203 (E.D.La. 1979); *Allied Chemical Corp. v. Gulf Atlantic Towing Corp.*, 244 F.Supp. 2 (E.D.Va. 1964). All the Circuits in addition to the Fifth which have passed upon requirements to procure insurance have held that they are not invalidated either by *Bisso* or as contrary to public policy. The Fourth Circuit so held in *Kerr-McGee Corp. v. Law*, 479 F.2d 61, 64 (4th Cir. 1973). The District of Columbia Circuit has approved the enforcement of insurance requirement provisions between contracting parties. *See generally Hooks v. Southeast Construction Corp.*, 538 F.2d 431 (D.C. Cir. 1976). The Seventh Circuit enforced a like insurance provision in *Calcasieu Chemical Corp. v. Canal Barge Co.*, 404 F.2d 1227 (7th Cir. 1969). The Sixth Circuit recently followed suit in *Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61 (6th Cir. 1982).

The Ninth Circuit's decision herein finds support in *Price v. Zim Israel Navigation Co., Ltd., supra* note 25 (a similar insurance arrangement was enforced despite the argument it was prohibited by statute), and *Willamette-Western Corp. v. Columbia Pacific Towing Co.*, 466 F.2d 1390 (9th Cir. 1972) (waiver of subrogation enforced and held "not unusual" in maritime contract).

case;[57] in 1979, this Court decided that there was no split among the Circuits which required a decision of this Court to resolve. There has been no change since then; on the contrary, the Ninth Circuit's decision herein supports and reinforces the leading authority on the subject, the cases decided by the Fifth Circuit.

## VI
## CONCLUSION

For the reasons set forth above, Dillingham respectfully suggests that Union's Petition for Certiorari should be denied. This case is of little concern except to those parties named in the caption, and the Ninth Circuit's decision herein is in concert with all of the relevant decisions on point. The insurance requirement provisions of the towage agreement are not exculpatory clauses and are fully enforceable, having been agreed to in an arms'-length commercial transaction; this has been the uniform holding of the courts below. Finally, there is no conflict among decisions of the Courts of Appeals which requires this Court's resolution.

Respectfully submitted,

HANCOCK, ROTHERT & BUNSHOFT

By FORREST BOOTH

JOHN R. PASCOE

*Attorneys for*
*Dillingham Tug &*
*Barge Corporation*

**(Exhibit 1 follows)**

[57] 444 U.S. 830 (1979).

**Exhibit 1**

12/17/76

ATTN: HARRY KINSELLA

THIS IS TO CONFIRM OUR VERBAL AGREEMENT THIS DATE.

COLLIER CARBON CHEMICAL COMPANY CHARTERS HAWAIIAN TUG AND BARGE TO TOW THEIR 300 FT X 60 FT BARGE FROM GALVESTON, TEXAS TO PORTLAND OREGON. ETD GALVESTON ON OR ABOUT 15 JAN.

THIS WILL BE A SINGLE TOW AT THE LUMP SUM OF DLRS 125,000 FIO. COLLIER WILL PAY ALL PANAMA CANAL COSTS AND OUTFIT THEIR BARGE FOR SEA WITH BRIDLE AND EQUIPMENT REQUIRED BY SURVEYOR HT AND B WILL PAY COLUMBIA RIVER COST FOLLOWING REVIEW BY BOTH PARTIES. THIS TOW WILL FOLLOW THE TERMS AND CONDITIONS OF THE FOSS TOWING AGREEMENT OF 12/7/71.

THANK YOU FOR AWARDING HT AND B THIS TOW.

BST HOLIDAY WISHES,

REY JONSSON

UNIONOIL LSA B

**Exhibit 2**

1/4/77

CHARLIE DOW
COLLIER CHEMICAL

REQUEST YOUR CONSIDERATION TO MODIFY CONTRACT LANGUAGE AS FOLLOWS:

ARTICLE 6 — COLLIER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS HT AND B, ITS AFFILIATES, THEIR OFFICERS, EMPLOYEES, AND REPRESENTATIVES, AND THE TUG AGAINST ALL CLAIMS, LIABILITIES, LOSS OR EXPENSE, INCLUDING COSTS AND ATTORNEY'S FEES, ARISING OUT OF OR CONNECTED WITH INJURY TO OR DEATH OF PERSONS EMPLOYED OR BEING ON OR ABOUT THE BARGE AND/OR LOSS OF OR DAMAGE TO THE BARGE, UNLESS SUCH SHALL HAVE BEEN DUE TO THE SOLE FAULT OF HT AND B. ADDITIONALLY, COLLIER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS HT AND B, IT'S AFFILIATES, THEIR OFFICERS, EMPLOYEES AND REPRESENTATIVES AND THE TUG AGAINST ALL CLAIMS, LIABILITIES, FINES, PENALTIES, LIENS AND ALL OTHER LOSS OR EXPENSE OF ANY NATURE WHATSOEVER, INCLUDING COSTS AND ATTORNEY'S FEES, ARISING OUT OF OR CONNECTED WITH POLLUTION OR CONTAMINATION OF THE ENVIRONMENT BY THE BARGE OR ITS CONTENTS.

ARTICLE 7 — COLLIER SHALL MAINTAIN HULL AND MACHINERY AND PROTECTION AND INDEMNIFY INSURANCE ON THE BARGE TO ITS FULL VALUE IN FORM AND AMOUNT SATISFACTORY TO HT AND B, AND SUCH POLICIES SHALL BE ENDORSED WITH WAIVER OF SUBROGA-

TION AGAINST HT AND B AND THE TUG AND SHALL NAME HT AND B AS AN ADDITIONAL ASSURED WITH LOSS PAYABLE TO COLLIER. COLLIER SHALL LOOK SOLEY TO ITS HULL AND MACHINERY INSURANCE FOR THE RECOVERY OF ANY LOSS OR DAMAGE TO THE BARGE AND SOLEY TO ITS PROTECTION AND INDEMNIFY INSURANCE FOR WRECK REMOVAL EXPENSES.

ARTICLE 9—NOTWITHSTANDING ANY OTHER PROVISION HEREIN TO THE CONTRARY, COLLIER SHALL HAVE NO RESPONSIBILITY WITH RESPECT TO AND HT AND B WILL INDEMNIFY, DEFEND AND HOLD COLLIER HARMLESS FROM ANY AND ALL CLAIMS, LIABILITIES, LOSS OR EXPENSE, INCLUDING COSTS AND ATTORNEY'S FEES, ARISING OUT OF OR CONNECTED WITH INJURY TO OR DEATH OF THE OFFICERS AND CREW OF THE TUG, AND/OR LOSS OF OR DAMAGE TO THE TUG, UNLESS SUCH SHALL HAVE BEEN DUE TO THE SOLE FAULT OF COLLIER.

WE BELIEVE THE AMENDED LANGUAGE PROVIDES NECESSARY PROTECTION FOR BOTH PARTIES WHILE CLEARLY DEFINING LIABILITY OF EACH PARTY.

THE POLLUTION CLAUSE WAS NOT NECESSARY IN 1971 AS IT IS TODAY. PLEASE ADVISE YOUR CONCURRENCE TO AMENDMENTS. IF YOU HAVE ANY QUESTIONS, PLEASE PHONE ME AT (808) 543-9307.

REY JONSSON

**Exhibit 3**

UNIONOIL LSA B

1/6/77 NR

ATTN MR REY JONSSON
HAWAIIAN TUG AND BARGE CO

REGARDS YOUR TELEX OF 1-5-77, COLLIER ACCEPTS YOUR MODIFICATIONS TO ARTICLES 6, 7, AND 9. WE CORRECTED THE COMMENCEMENT DATE TO JANUARY 20, AND THE AGREEMENT DATE TO THE 17TH DAY OF JANUARY. THIS ASSUMES MR. OPATZ WILL SIGN THE AGREEMENT WITH OUR MR. OPENSHAW DURING YOUR VISIT ON JANUARY 17. PLEASE ACKNOWLEDGE.

C. A. DOW, MANAGER
PROJECT ENGINEERING

**Exhibit 4**

1/7/77

COLLIER CARBON CHEMICAL CORP
UNION OIL CENTER
P O BOX 60455
LOS ANGELES, CALIF

ATTN MR C A DOW

THANK YOU FOR YOUR CONCURRENCE WITH PROPOSED MODIFICATIONS. MR. OPATZ WILL SIGN AGREEMENT DURING 17 JAN VISIT.

BEST WISHES,

REY JONSSON
H T B

**Exhibit 5**

1/18/77 NR

ATTN MR REY JOHNSON
DILMAR CORPORATION
HONOLULU HAWAII

YOU AND WE AGREED BY TELEPHONE THIS DATE THAT THE DRAFT OF THE TOWAGE AGREEMENT, DATED JANUARY 2, 1977, AND THE MODIFICATIONS SUBSTITUTED THERETO FOR ARTICLES 6, 7, AND 9 TO ACCORD WITH YOUR TELEX OF JANUARY 5, 1977 AND COLLIER'S TELEX OF JANUARY 6, 1977 ARE BINDING AS A CONTRACT TO BOTH PARTIES UNTIL THE OFFICIAL CONTRACT IS CONFORMED. TWO COPIES OF THE OFFICIAL TOW AGREEMENT SIGNED BY OUR VICE PRESIDENT, MR. OPENSHAW, WERE MAILED TO YOUR OFFICE ON THIS DATE. PLEASE ACKNOWLEDGE. REGARDS,

C A DOW, MANAGER

**Exhibit 6**

1/19/77
1430 HOURS

ATTN: C A DOW

THIS IS TO ACKNOWLEDGE AND AGREE TO UR TLX OF 1/18/77. WE APPRECIATE THE OPPORTUNITY TO BE OF SERVICE TO COLLIER.

REY JONSSON
H T AND B

**Exhibit 7**

UNIONOIL LSA C

DILMAR CORPORATION 1/26/77

MR. REY JONSSON

PER OUR DISCUSSION YESTERDAY, COLLIER IS UNABLE TO NAME HT AND B AS ADDITIONAL ASSURED ON P AND I POLICY. ALSO HT AND B MUST OBTAIN ITS OWN TOWERS LIABILITY.

REGARDS,
C. A. DOW, MANAGER
PROJECT ENGINEERING

**Exhibit 8**

1/28/77

UNION OIL LSA
ATTN: C A DOW

RE INSURANCES ON BARGE COLUMBIA. AGREE TO DELETION OF REQUIREMENT THAT HTB BE ADDT'L ASSURED UNDER P AND I POLICY BUT PRESUME P AND I UNDERWRITERS DO AGREE TO WAIVER OF SUBROGATION. PLEASE CONFIRM. ALSO CONFIRM THAT HTB IS NAMED AS ADDT'L ASSURED WITH WAIVER OF SUBROGATION UNDER BARGE HULL AND MACHINERY POLICY. WE CONFIRM HTB HAS TOWER'S LIABILITY.

REY JONSSON
HTB

**Exhibit 9**

JAN 28/77 AM

TO: MR. REY JONSSON RUSH
DILMAR CORPORATION
HONOLULU HAWAII 96801

RE YOUR TELEX 1-28-77, CONFIRM THAT UNDERWRITERS AGREE TO WAIVER OF SUBROGATION UNDER BARGE P AND I POLICY. ALSO CONFIRM THAT HTB IS NAMED AS ADDITIONAL ASSURED WITH WAIVER OF SUBROGATION UNDER BARGE HULL AND MACHINERY POLICY. REGARDS,

C.A. DOW, MANAGER
PROJECT ENGINEERING

**Exhibit 10**

Collier Carbon and Chemical Corporation

Union Oil Center
P.O. Box 60455, Los Angeles, California 90060
213-486-6803

UNION COLLIER

December 27, 1976
PE—1159

Mr. Rey Jonsson
Marketing Manager
Hawaii Tug & Barge Co., Ltd.
P. O. Box 3288
Honolulu, Hawaii 96801

Dear Rey:

Re: P-8187 $NH_3$ River Barge Columbia Towing Agreement

Enclosed for your review is a draft of the Collier proposed towing agreement which is essentially the same as the Collier-Foss agreement of 1971.

Please review, and if you have comments, please phone C. A. Dow at (213)-486-6801 or telex same to expedite execution of the agreement.

Happy Holiday Season.

Sincerely,

/s/ Harry E. Kinsella CAD
Harry E. Kinsella
Project Manager

HEK:mm
Enclosure
cc: w/enclosure
G. Stearns/J. Niederhauser
Foss Tug & Launch